K & W Trucking, Inc., d/b/a Circle Transport *and* Teamsters Local Union 413, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America *and* Larry R. Riffle. Cases 9-CA-8387 and 9-CA-9562

August 24, 1981

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On January 7, 1980, Administrative Law Judge William F. Jacobs issued the attached Decision in this proceeding. Thereafter, the Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and, on the facts and for the reasons set forth below, to adopt his recommendation that the Respondent be ordered to comply with the Orders heretofore issued in these cases.

On November 26, 1974, the Board issued its original Decision and Order in Case 9-CA-8387,[1] finding *inter alia* that the Respondent had discharged Larry Riffle in violation of the National Labor Relations Act, as amended, and ordering that the Respondent reinstate him and make him whole for his lost earnings. In so deciding, the Board denied the Respondent's motion for reconsideration, wherein, for the first time, it sought to establish that K & W Trucking, Inc., and Circle Transport were two separate and independent corporations and, thereby, to repudiate its answer to the complaint which admitted that K & W Trucking, Inc., d/b/a Circle Transport, was engaged in commerce and met the Board's jurisdictional standards. In this respect, the Board observed that from the time the original unfair labor practice charge was filed "both K & W and Circle were sufficiently forewarned that the charge was being instituted against them as one and the same business entity," and that both before and during the hearing the Respondent had ample opportunity to raise the issues it belatedly sought to raise in the aforesaid motion.

Thereafter, on November 18, 1975, the United States Court of Appeals for the Sixth Circuit entered a Consent Judgment[2] enforcing the Board's Order.

On September 30, 1976, a backpay specification issued in the same case alleging the amount of backpay then due Riffle. A complaint also issued on that date in Case 9-CA-9562, alleging that the Respondent had discriminatorily refused to reinstate Riffle to his former or substantially equivalent position and thereafter constructively discharged him for unlawful reasons.

These cases were duly consolidated for hearing, which was held before Administrative Law Judge Frank H. Itkin on December 1, 1976. Thereafter, on March 3, 1977, Administrative Law Judge Itkin issued his Supplemental Decision in the consolidated cases,[3] finding, *inter alia*, that backpay in the amount of $15,539.09 plus interest was due Riffle as a result of the prior unfair labor practices found and that the Respondent, by its more recent discriminatory treatment of Riffle, culminating in the latter's constructive discharge on or about March 27, 1975, further violated Section 8(a)(3) and (1) of the Act. In so holding, the Administrative Law Judge rejected the Respondent's contention, renewed in Case 9-CA-9562, that K & W and Circle were two separate and independent corporations, finding that that case involves "the same parties and, in effect, the same transaction," and is in all essential respects "a supplemental proceeding emanating from the initial case" in which "compliance with the Board's initial Order" is sought; and, accordingly, that the Respondent is estopped from relitigating this issue, previously determined in Case 9-CA-8387.

In the absence of timely exceptions to the Administrative Law Judge's Supplemental Decision, the Board, on May 17, 1977, issued its Supplemental Order, as amended, adopting *pro forma* the findings and conclusions of the Administrative Law Judge and his recommended Order requiring the Respondent to offer Riffle immediate and full reinstatement to his former or substantially equivalent position and to make him whole for any loss of earnings suffered by reason of his unlawful termination.

Thereafter, on March 16, 1978, the United States Court of Appeals for the Sixth Circuit issued its Supplemental Judgment enforcing the Board's Supplemental Order, as amended.

Subsequently, the General Counsel alleged that before full compliance with the Board's Supplemental Order, as amended and enforced, could be obtained K & W, and its successors, K & L and

[1] 215 NLRB 127.

[2] No. 75-1930.

[3] JD 140-77, attached hereto.

Warehouse Trucking, Inc., filed bankruptcy proceedings and were thereafter adjudicated bankrupt.

Believing that there was a question as to whether Circle, as a legal entity, could be held liable for any backpay due Riffle, the General Counsel caused the Regional Director for Region 9 of the Board to issue a notice of supplemental hearing, alleging *inter alia* that at all times material Circle, K & W, and its successors are and have been a single or joint employer of the employees of K & W and its successors and, accordingly, that Circle is jointly and severally liable for the backpay due Riffle. Circle filed an answer denying the General Counsel's allegations, raising a question concerning the Board's jurisdiction over the instant controversy, and further asserting that Circle was not a party to any prior proceeding in which liability for backpay was determined and, therefore, that any award against Circle would violate its constitutional right to due process as well as Section 10(b) of the Act.

Thereafter, the matter came to be heard before Administrative Law Judge Jacobs, who held that the Board's original Decision and Order[4] was dispositive of the issues here presented and recommended that the Respondent, encompassing Circle, be ordered to comply with the Board's Supplemental Order, as amended and enforced, in which it adopted the findings, conclusions, and recommendations of Administrative Law Judge Itkin. We agree, finding no merit in the exceptions before us.

In its exceptions, Circle asserts that the Board's original Decision and Order is not dispositive of the question concerning *its* liability for the backpay due Riffle because: (1) in the original proceeding, the question concerning its relationship with K & W was raised only in the context of a challenge to the Board's jurisdiction; (2) even if the original Decision purported to resolve the matter of Circle's derivative liability for Riffle's backpay, it cannot be so construed, as Circle was neither joined as a party nor did it make an authorized appearance during the initial proceeding; and (3) in any event the notice of supplemental hearing "has effectively vacated that Decision."[5] Circle also contends that, as it did not have an opportunity to defend against the unfair labor practices herein alleged and found, a determination that it is liable for the backpay due Riffle would violate due process and contravene Section 10(b) of the Act.

On the merits, Circle argues that it is neither an *alter ego* of, nor a joint employer with, K & W; but is, rather, a separate, wholly independent business entity, not otherwise liable for remedying the unfair labor practices committed by K & W or its successors.[6]

Insofar as Circle argues that it may now litigate the nature of its relationship with K & W, notwithstanding our earlier determination of that issue, because it arises in the context of a question concerning liability, not jurisdiction, that argument must fail. It is settled law that a decision regarding that relationship, once having been made, would be conclusive in all further litigation bearing upon this controversy should we find, as indeed we do, that Circle is bound as a party to the original proceeding herein.

In this respect, although Circle contends that it was not "properly" joined as a party and therefore did not have the opportunity to defend against the unfair labor practices found, the facts show otherwise. At the outset, Circle alone was named as the offending employer in the original charge filed in Case 9-CA-8387 and the name of the Respondent, as presently captioned—a clear signal that Circle and K & W were to be treated as one and the same business entity—appeared in the complaint which was thereafter served on Circle at the latter's Circleville, Ohio, place of business. Service thereof was accepted by LaVerne Wills on behalf of Circle and, as found below, as Circle's agent.[7]

Significantly, Circle does not claim to have been unaware of the commencement of these proceedings or uninformed as to their nature. Indeed, Frank Manfredi, Circle's representative, testified otherwise at the hearing before Administrative Law Judge Jacobs:

> Q. And did you receive, from time to time, documents in the mail from the National Labor Relations Board which had title K & W Trucking, Inc., d/b/a Circle Transport on them?

[4] 215 NLRB 127 (1974), wherein the Board found the Respondent to be a single business entity.

[5] Under our statutory framework, the General Counsel exercises a prosecutorial function. It is fundamental that, in so acting, the General Counsel neither intended to, nor could he, intrude upon the Board's judicial function by "vacating" an Order issued by the latter and enforced by a United States Court of Appeals. Further comment on this point is unnecessary.

[6] In view of our decision herein, we find it unnecessary to reach or pass upon this latter argument advanced by Circle.

[7] It is undisputed that K & W conducted its business operations from Circle's facility at Circleville, Ohio, located some 175 miles from the latter's principal place of business at Newbury. Frank Manfredi, president of Circle at times material herein, testified at the hearing before Administrative Law Judge Jacobs that he visited the Circleville facility "at least once a month." At all other times, Circle's affairs at the Circleville facility were entrusted to "Charlie" Keaton and LaVerne Wills, owners of K & W, who, among other things, dispatched Circle drivers, made purchases of materials or supplies on Circle's behalf, and, as revealed in the testimony adduced during the prior hearings in these cases, handled Circle's customer problems and complaints. In view of the foregoing, we find that, at all times material herein, Keaton and/or Wills acted as agents of Circle in the conduct of the latter's business at Circleville.

A. We might have. I don't recall, there seems to be some documents that we did receive, yes.

* * * * *

Q. Did you ever discuss the situation with Mr. Wills when it first came to your attention that K & W Trucking had been captioned as doing business as Circle Transport?

A. I presume we did, yes.

Q. Do you recall what the discussion was about?

A. No, I wouldn't remember that.

Q. Other than talking with Mr. Wills about it, did you take any other action?

A. None whatsoever.

Q. None at all?

A. No.

In view of the foregoing, we find that, from the outset, Circle was on notice that it was named as a party respondent and, having chosen to ignore the Board's service, did so at its peril.[8] In sum, since this is not a case where Circle can claim it could not have reasonably foreseen the import of litigation on future controversies, it cannot now complain because it is barred by a determination of an issue which it previously chose either to ignore or concede.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, K & W Trucking, Inc., d/b/a Circle Transport, Circleville, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Orders heretofore issued in these proceedings.

[8] The circumstances attendant herein are thus distinguishable from those in *Clinch Valley Clinic Hospital* v. *N.L.R.B.*, 516 F.2d 996 (4th Cir. 1975), upon which Circle relies. In that case, a partnership was absolved of liability as the General Counsel, having specifically stated that the partnership was not being named as a party respondent, moved only to amend a complaint by adding the partnership as a "party in interest," and, therefore, in the opinion of the court, sought relief which was at variance with the complaint itself.

DECISION

WILLIAM F. JACOBS, Administrative Law Judge: This case was heard before me on January 16, 1979,[1] at a supplemental hearing held in Columbus, Ohio, with the sole issue to be decided whether K & W Trucking, Inc., and Circle Transport are joint employers. In Case 9-CA-8387 (215 NLRB 127),[2] however, the National Labor Relations Board on November 26, 1974, issued a Decision and Order in which it determined that K & W Trucking, Inc., and Circle Transport were not only joint employers but one and the same Respondent. Inasmuch as it is not the province of an administrative law judge to question the Board's decisions, I find its Decision and Order in the cited case dispositive of the issue here presented. Consequently, there being no remaining issues to resolve, it is recommended that Respondent be ordered to comply with the Board's Supplemental Order of May 17, 1977, and its Amended Supplemental Order of February 3, 1978,[3] in which it adopted the findings and conclusions of Administrative Law Judge Frank H. Itkin, as contained in his Supplemental Decision in K & W Inc., d/b/a Circle Transport, Cases 9-CA-8387 and 9-CA-9562 dated March 3, 1977, and in which it ordered Respondent K & W Trucking, Inc., d/b/a Circle Transport, its officers, agents, successors, and assigns, to take the action set forth in the recommended Supplemental Order of the Administrative Law Judge.

[1] On motion of the General Counsel, this Decision has been held in abeyance pending the conclusion of bankruptcy proceedings involving K & W Trucking, Inc.

[2] Enforced by the United States Court of Appeals for the Sixth Circuit on November 18, 1975.

[3] Enforced by the United States Court of Appeals for the Sixth Circuit on March 16, 1978.

SUPPLEMENTAL DECISION

FRANK H. ITKIN, Administrative Law Judge: On November 26, 1974, the National Labor Relations Board issued its Decision and Order in Case 9-CA-8387 (215 NLRB 127), directing Respondent K & W Trucking, Inc., d/b/a Circle Transport, to make whole employees Larry R. Riffle and Leonard E. Sines for their losses resulting from Respondent's unfair labor practices, in violation of Section 8(a)(1) and (3) of the National Labor Relations Act. On November 18, 1975, the United States Court of Appeals for the Sixth Circuit entered a Consent Judgment enforcing in full against Respondent the backpay provisions of the Board's Order. The parties have been unable to agree on the amount of backpay due to employee Riffle and, consequently, on September 30, 1976, a backpay specification and notice of hearing issued.

In addition, on August 14, 1975, employee Riffle filed an unfair labor practice charge against Respondent in Case 9-CA-9562. On September 30, 1976, a complaint issued in that case. Respondent had reinstated employee Riffle on or about February 3, 1975. The new complaint alleges that Respondent violated Section 8(a)(1), (3), and (4) of the Act by refusing to reinstate employee Riffle to his former or substantially equivalent position and by constructively discharging him on or about March 27, 1975.

On September 30, 1976, Cases 9-CA-8387 and 9-CA-9562 were consolidated. On December 1, 1976, a hearing was held before me in Columbus, Ohio. Upon the entire record in this consolidated proceeding, including my observation of the witnesses, and after due consideration of the brief filed by the General Counsel, I make the following findings of fact and conclusions of law:

I. THE BACKPAY PROCEEDING

A. *The Backpay Period and Formula*

The specification alleges that the backpay period for employee Riffle commenced on November 15, 1973, and cannot be tolled until Respondent has made a bona fide offer to reinstate Riffle to his former or a substantially equivalent position. The appropriate measure of backpay due to employee Riffle, as set forth in the specification, is his average earnings as a truckdriver for Respondent during the two pay periods immediately preceding his unlawful termination. The specification alleges that Riffle was initially hired by Respondent in February 1973; that he was injured in an on-the-job accident on or about April 2, 1973; that he was continued on temporary total disability until on or about October 28, 1973; and that the pay periods of November 9 and 16, 1973, under these circumstances, are the best indication of his earnings. Employee Riffle's earnings for the pay periods of November 9 and 16, 1973, were $180.50 and $142.50, respectively, or an average of $161.50. His quarterly gross backpay is determined by multiplying this average weekly earning ($161.50) by the number of weeks in the appropriate quarters. Calendar quarterly net backpay is the difference between calendar quarterly gross backpay and calendar quarterly net interim earnings, if any.

The law is clear that the "finding of an unfair labor practice . . . is presumptive proof that some backpay is owed" (*N.L.R.B.* v. *Mastro Plastics Corporation and French American Reeds Manufacturing Company, Inc.*, 354 F.2d 170, 178 (2d Cir. 1965), cert. denied 384 U.S. 972 (1966)), and the General Counsel's burden is limited to showing "what would not have been taken from [the employee] if the company had not contravened the Act." *Virginia Electric and Power Company* v. *N.L.R.B*, 319 U.S. 533, 544 (1943). This allocation of the burden was expressed in *N.L.R.B.* v. *Brown & Root, Inc., et al.*, 311 F.2d 447, 454 (8th Cir. 1963), as follows:

> [I]n a backpay proceeding the burden is upon the General Counsel to show the gross amounts of backpay due. When that has been done, however, the burden is upon the employer to establish facts which would negative the existence of liability to a given employee or which would mitigate that liability.[1]

Further, as the court stated in *N.L.R.B.* v. *Brown & Root, Inc.*,, 311 F.2d at 452:

> Obviously, in many cases it is difficult for the Board to determine precisely the amount of back pay which should be awarded to an employee. In such circumstances the Board may use as close approximations as possible, and adopt formulas reasonably designed to produce such approximations. . . . [W]ith respect to the formula for arriving at back pay rates or amounts which the Board may deem necessary to devise in a particular situation, [judicial] inquiry may ordinarily go no further than to be satisfied that the method selected cannot be declared to be arbitrary or unreasonable in the circumstances involved.

"Certainty in the fact of damage is essential. Certainty as to the amount goes no further than to require a basis for a reasoned conclusion." *Palmer, et al., Trustees* v. *Connecticut Railway & Lighting Co.*, 311 U.S. 544, 561 (1941).

Respondent, in paragraph 2 of its answer to the specification, generally "denies that an appropriate measure of the backpay due Riffle is the earnings for [the] two pay periods [in November 1973], but that under the cases pertaining thereto, the earnings of the driver in a substantially equivalent position during the period of alleged discrimination would be the appropriate measure of backpay." Respondent, in its answer, does not set forth "in detail his position" or furnish the "appropriate supporting figures," as required in Sections 102.54(b) and (c) of the Board's Rules and Regulations. In any event, on the entire record in this case, I find and conclude that the General Counsel has used "as close approximations as possible" and has adopted a formula "reasonably designed to produce such approximations." *N.L.R.B.* v. *Brown & Root, Inc., supra*. For, as the Board noted in *Fibreboard Paper Products Corporation*, 180 NLRB 142, 143–144 (1969), enfd. 436 F.2d 908 (D.C. Cir. 1970), cert. denied 403 U.S. 905 (1971), "the circumstances herein permit only reasonable approximation" and "any uncertainty must be resolved against the wrongdoer whose conduct made certainty impossible."

In the initial unfair labor practice proceeding, the Board, in agreement with the Administrative Law Judge, found (215 NLRB 127, 129 (1974)):

> Truckdriver Riffle was hired in February 1973. He was injured in an accident about 2 months later, and upon advice of his doctor was permitted to return to work about October 1, on a temporary basis. He was scheduled to be off from work on . . . November 16, to go to Columbus for his permanent release. . . .[2]

According to Respondent's computations of employee Riffle's gross earnings during his employment in 1973 (Resp. Exh. 1), the employee received on October 12, after his return to employment, two paychecks totaling $184.17. One week later, on October 19, the employee received a paycheck in the amount of $174.65. And, finally, during the employee's last 2 weeks of work before his unlawful termination, November 9 and 16, he received paychecks in the separate amounts of $180.50 and $142.50. Under these circumstances, I find and conclude that the General Counsel reasonably approximated employee Riffle's average weekly earnings at $161.50 in computing his wage loss during the backpay period. As a

[1] Although the General Counsel is required to present only the "gross amounts of backpay due," he goes further, pursuant to the Board's Rules and Regulations and Statements of Procedure, Series 8, as amended (29 C.F.R. § 102.53), and includes in the backpay specification a deduction from gross backpay of all those amounts in mitigation which he discovered through, for example, social security records. The General Counsel does not thereby assume "the burden of establishing the truth of all of the information supplied or of negativing matters of defense or mitigation." *N.L.R.B.* v. *Brown & Root, Inc., supra*, 311 F.2d at 454.

[2] As noted, Riffle was unlawfully terminated on November 15, 1973.

consequence of Riffle's on-the-job accident and extended period of disability, his average earnings during the last two pay periods before his unlawful firing afford a reasonable measure for approximating his loss.

Respondent contended that "the earnings of the driver in a substantially equivalent position during the period of alleged discrimination would be the appropriate measure of backpay." Employee Riffle, prior to his unlawful termination on November 15, 1973, was principally employed by Respondent to drive a tractor on a "shuttle run" for General Electric Company between Circleville and Logan, Ohio. Laverne Wills, an officer of Respondent, testified that at least two drivers were assigned to the "shuttle run." Wills named Lloyd Ratcliff[3] as one of the drivers in this "shuttle run." Wills identified the Federal quarterly tax returns for the Respondent from the quarter ending December 31, 1973, to the quarter ending September 30, 1976. Wills cited the reported wages of driver Ratcliff during the various quarters in support of the contention that the General Counsel's gross backpay, as alleged in the specification, is too high. However, as stated, Ratcliff was not the only driver on this "shuttle run" and the amounts, if any, paid to other drivers on this run during the pertinent period are not identified or cited by Respondent. Further, Ratcliff's reported quarterly wages during this period range from $279.75 to $2,612.04. Wills generally asserted that the "low figures" for Ratcliff for two quarters in 1975 were caused by Ratcliff being "off work because of [an] accident" and that the "variance in the middle of the year" was caused by General Electric being "off production for a while in the summer." Respondent, however, has filed no brief analyzing these figures or further explicating this contention. Consequently, on this record, I find and conclude that the General Counsel's method of approximating the loss to employee Riffle to be more reasonable and reliable.[4]

B. *The Computation of Net Backpay from November 15, 1973, Through December 31, 1974; the Claim That Riffle Failed To Mitigate His Loss During This Period*

Respondent, in its answer to paragraph 5 of the specification, does not dispute the computation of employee Riffle's net backpay during the initial quarter of the backpay period—i.e., the fourth quarter of 1973. Respondent, however, "denies that lines 2 through 7" of paragraph 5 of the specification "reflect the proper net earnings" for the subsequent quarters of the backpay period because employee Riffle, "without adequate cause, quit his employment at Owens-Illinois, Inc., and thereafter did not properly mitigate his damages."

Employee Riffle's formal education ended in the sixth or seventh grade. He can read and write only a "small amount." He had worked for Respondent as a truckdriver until his unlawful termination on November 15, 1973. He did not initially apply to the Ohio Bureau Of Employment Services for assistance in obtaining work "because [he would] get [himself] a job." Riffle testified that, "when [I] was discharged, I went to Roadway; I went to Smith's Transfer; I went to Ashman's Mill in Circleville, Ohio. I went to Fletcher Trucking Company."[5] Riffle, however, was unable to get work with the above employers as a truckdriver and, on November 30, 1973, about 2 weeks after his discharge, accepted employment with Owens-Illinois, Inc., in Circleville as a utility worker.[6] Riffle's job with Owens-Illinois principally involved hauling corrugated paper or board from a machine to a loader or boxes. His title was "off-bearer" and he was paid $3.24 and, later, $3.29 an hour.

Employee Riffle acknowledged that on or about March 14, 1974, he voluntarily "quit" this job with Owens-Illinois. He recalled that he had heard that "there was going to be a layoff . . . ." Riffle admittedly had not received a "notice of termination" and no specific date for his layoff had been set by the employer. He explained: "I was told there would be a layoff shortly . . . I quit that job . . . I was trying to get into an established business which I thought some day would be a substantial business." Riffle also made applications for employment as a truckdriver during this period. He recalled:

> As I said, I went out and filled out an application at the different trucking companies at different times. I tried a place over at Washington Court House . . . I can tell you where it is but I can't think of the name. I went over to Greensfield, Ohio; there was a company down there that a guy told me was hiring . . . and I got in the car and drove down there and tried to get a job, and I tried several different places here in Columbus. And, there just wasn't none.

Billy Walker, a supervisor for Owens-Illinois, testified that Riffle worked under his direction during 1974; that Riffle had stated "on different occasions [that] he didn't like . . . working in a plant" and "would rather work outside"; and that Riffle "quit" his job with Owens-Illinois on March 14, 1974. Walker acknowledged that Riffle was performing a "back-breaker" job as "off-bearer"; that Owens-Illinois did not offer Riffle a truck-driving job; and that, during this period, business "slowed down" and "there was talk about laying off" workers.

The specification alleges no gross interim earnings for Riffle during the second and third quarters of 1974. The specification avers: "In these two quarters, Riffle was self-employed in the masonry business" and his "income

[3] Also named as Roy Radcliffe in the record.

[4] On cross-examination, Riffle testified:

> Q. Therefore, what Mr. Radcliffe made during the time you were discriminated against would be a good reflection of what your average earnings would have been if in fact you had remained on that job?
>
> A. That's correct sir.

However, Riffle was not working on the "shutle run" during this period and, consequently, his general acknowledgment in answer to the above question is of no special value here.

[5] Respondent's Secretary-Treasurer Wills testified: "I do recall Smith Transfer calling me one day and asking me some questions about Riffle, his ability and so forth."

[6] Riffle's net interim earnings with this employer, Owens-Illinois, were $596.75 during the fourth quarter of 1973 and $1,623.06 during the first quarter of 1974. His net backpay during these two quarters was $372.25 and $476.44, respectively, as alleged in the specification.

tax filings indicate that he suffered a net loss while so employed." Riffle explained that after leaving Owens-Illinois he "went into the masonry business"—he "went to work with Harold Haddox" in order to learn "bricklaying." Riffle testified:

> Q. (By Mr. Kingsley): Did you terminate your employment at Owens-Illinois in March of 1974, is that correct?
>
> A. Yes, sir.
>
> Q. What did you do for employment after March of 1974, Mr. Riffle?
>
> A. I went into the masonry business.
>
> * * * * *
>
> Q. Who did you go to work for?
>
> A. I went to work with Harold Haddox, not for him.
>
> Q. What is your prior experience in the masonry business?
>
> A. Very little such as of the time I went to work with Mr. Haddox.
>
> Q. In fact you had no prior masonry experience?
>
> A. As far as laying brick no. I had had no experience in laying brick.
>
> Q. What was your working relationship with Mr. Haddox, what work were you performing, what were your duties?
>
> A. Well, I was trying to help him, attempting. I was also lining up work for us to do.
>
> Q. You were an apprentice were you not, you hauled mortar and did things an apprentice does in learning to become a bricklayer?
>
> A. Yes, sir.
>
> Q. Did you have any income set-up with Mr. Haddox on how you were paid on the job?
>
> A. No, sir.
>
> Q. How in fact were you paid?
>
> A. I was paid, you know, he give me a percentage of the job; if I helped him line up the job I got a percentage of it.
>
> Q. How many jobs did you in fact line up?
>
> A. I have no records of it.
>
> Q. Did you make an income?
>
> A. Yes, sir.
>
> Q. How much income did you make?
>
> A. At one particular time there I believe it was $140.00.[7]

Harold Haddox testified, as follows:

> I am a union bricklayer . . . just over 55 and I was out of union work. . . . Larry [Riffle] came to me and made the proposition that we go into business together. I was to teach him to lay brick and he was to furnish the equipment . . . if he could get it. . . .
>
> Larry bought the mixer. . . . I split the equipment and gave him a percentage of what I thought he was worth . . . .

Haddox recalled that Riffle "told me [that] he did have prospects on other jobs" but they did not "materialize." Riffle had purchased a mixer for about $900 and other equipment. Haddox testified that "I paid the mixer payments; I paid all those and what I paid him was what he worked for. This was not over a long period of time; only about two or three weeks." Haddox generally acknowledged paying Riffle about $140. Later, Haddox specifically recalled paying Riffle "$90 on one job and $170 on another job."

According to Riffle, "after Mr. Haddox went back to the union job, I was left by myself and I went to work with Albert Hanes." Riffle explained that: "I got hold of Mr. Hanes and I asked him if he would come show me the masonry business and I'd furnish the equipment and . . . he said yes. . . ." In addition, Riffle testified that during his association with Hanes in the second and third quarters of 1974, they had a "50 percent" partnership; Riffle was responsible "to procure contracts"; Hanes was an experienced mason; and Riffle in fact obtained about three contracts. However, Riffle noted: "I had to buy a truck . . . a trailer to haul . . . . And, this is the reason for the loss [during this period]. And, I had to buy scaffold planks and stuff like this." Ultimately, as Riffle recalled, "it was just costing me more than I was making and we had to dissolve the partnership . . . ."

The specification alleges that during the fourth quarter of 1974 Riffle obtained employment with one Frank Cahill, a builder in Circleville, and had net interim earnings of $771. Riffle testified that he performed carpentry and masonry services for Cahill as a subcontractor until about the end of 1974. His net backpay during this quarter is $1,328.50.[8]

On this record, I reject Respondent's assertion that employee Riffle incurred a willful loss in earnings during this portion of the backpay period. "The cases are unanimous" that the defense of willful loss of earnings is an "affirmative defense," and the burden is on the employer to prove the defense. *N.L.R.B.* v. *Mooney Aircraft, Inc.*, 366 F.2d 809, 813 (5th Cir. 1966). Moreover, while the employer may show that the employee failed to make

[7] Riffle further testified with respect to his arrangement with Haddox, as follows:

> Q. How many jobs did you attempt to secure for you and Mr. Haddox to lay bricks on and you were to get a percentage?
>
> A. Quite a few of 'em.
>
> Q. How many?
>
> A. I have no idea of how many.
>
> Q. Did you get any?
>
> A. Sure.
>
> Q. How many did you get?
>
> A. Well, I don't know, there was two or three jobs, I don't remember exactly how many.
>
> Q. Let's talk about the second quarter of 1974, how many jobs did you get and received money from Mr. Haddox for doing work on?
>
> A. I only done one job in 1974 for Mr. Haddox.
>
> Q. The entire year of 1974?
>
> A. That I received money for.
>
> Q. Did you do any other work, go into any other profession besides bricklaying during that year for other employment?
>
> A. I guess I didn't.

[8] I have credited the testimony of Riffle as summarized in this section. His testimony is substantiated in part by the testimony of Haddox and Walker. And, relying upon demeanor, I find Riffle to be a trustworthy witness.

"reasonable efforts to mitigate [his] loss of income . . . [the employee] is held . . . only to reasonable exertions in this regard, not the highest standard of diligence." *N.L.R.B.* v. *Arduini Manufacturing Corp.*, 394 F.2d 420, 422, 423 (1st Cir. 1968). "Success" is not the measure of the sufficiency of the employee's search for interim employment; the law "only requires an honest good faith effort." *N.L.R.B.* v. *Cashman Auto Company*, 223 F.2d 832, 836 (1st Cir. 1955).

Although employee Riffle failed to apply to the appropriate state agency for assistance during this period, he nevertheless promptly obtained interim employment following his unlawful termination. Employee Riffle, a truckdriver, also attempted during this period to obtain truckdriving work. He was unsuccessful. He accepted less desirable and less remunerative work as an "off-bearer" of paper or board with Owens-Illinois. He performed this work from about November 30, 1973, until March 14, 1974. He heard rumors of layoffs and, in addition, was interested in finding more suitable work and improving his position. Consequently, he quit his "off-bearer" job and made a series of arrangements with experienced masons, Haddox and Hanes, in an effort to learn their trade. He purchased equipment. He attempted to procure building work. And, during this period, he continued to look for truckdriving work without success. Ultimately, his efforts in the masonry business were a failure; and, periodically, he performed masonry services for Cahill, an established builder. Under all these circumstances, I find and conclude that employee Riffle made a good-faith effort to mitigate his loss during this period. I am not persuaded that Riffle, by quitting his "off-bearer" job with Owens-Illinois in an attempt to find more suitable work, incurred a willful loss in earnings. Rather, I find that employee Riffle was reasonably attempting to improve his economic position. And, of course, success is not the measure of reasonableness. I therefore reject Respondent's assertion and would award employee Riffle the net backpay during this period, as modified below.[9]

C. *Respondent Offers Reinstatement to Employee Riffle During Late January 1975; Riffle Is Not Given His Former Job Assignment*

The specification alleges that employee Riffle accepted Respondent's offer of reinstatement; that Respondent did not reinstate Riffle to his former or a substantially equivalent position; that Respondent continued to discriminate against Riffle after he returned to work; and that Respondent constructively discharged Riffle for unlawful reasons on or about March 27, 1975. Respondent, in its answer, denies these allegations. The pertinent evidence is summarized below.

Riffle testified that Respondent offered him reinstatement on or about January 29, 1975. Laverne Wills, an officer of Respondent, notified Riffle during late January that the employee, in order to return to work, would be required "to take a physical" examination, a "road test," and a "written examination." Riffle met these requirements and resumed work on or about February 3, 1975. Riffle, before his unlawful termination in November 1973, had been assigned by Respondent to drive the "shuttle run" for General Electric between Circleville and Logan. This "shuttle run" was "available" on February 3, 1975. Respondent, however, would not reassign Riffle to this run. Instead, Riffle was given a "different" assignment, which involved longer hours, greater waiting time, and "less pay."[10] Riffle recalled that "Wills told me I was not allowed to drive the General Electric run"—I was no longer welcome at the General Electric plant."

In addition, Riffle testified that he had been assigned a 1973 truck during November 1973. Upon Riffle's return in February 1975, Respondent assigned him a 1966 vehicle "that had quite a few mechanical problems." For example, as Riffle recalled, the heater and windshield wipers did not function properly; the "pump went out"; and there were numerous breakdowns. Riffle attempted to "discuss" these problems with management and he "was laughed at [and] told there is nothing wrong . . . it was all in [his] head . . . ." Further, in 1973, management had notified Riffle "if we had a cancellation of a load"; but "upon [his] return . . . if [his] load cancelled out [he] was not called . . . ." And, as Riffle further explained:

> When I worked there before, if you'd have a breakdown, for example, if I was on the shuttle run to Logan and the shuttle run broke down, immediately I would have another tractor . . . . When I went back to work in 1975, if I had a breakdown, I . . . lost money because I did not get a replacement tractor . . . .

Riffle worked for Respondent from about February 3 until March 27, 1975. During this period, Wills apprised Riffle that Respondent "was going to have a leasing program whereby [drivers would] have to sign a lease" or they "didn't have a job."[11] During March 1975, Wills asked Riffle if he was going to sign the contract or lease. Riffle replied that he "didn't think" that he was "going to sign one." Riffle's last day of work was March 27, 1975. Riffle explained:

> Mr. Wills had said if we didn't sign the leases, we no longer had a job . . . . I did not sign a lease. . . . I went back to the Company on Monday and checked the mail box . . . and there was no load there. I checked Tuesday, my name was not written on the load sheet . . . . I checked Wednesday, there was no load listing . . . . I checked Thursday and Friday likewise. The following week I asked Wills about the reason I didn't get any loads

[9] The General Counsel, in his brief, admits that the second quarter of 1974 should show interim earnings of $140 as generally acknowledged by Riffle. Haddox, however, approximated these interim earnings to be $260 and I find Haddox's testimony to be more accurate in this respect. I will therefore correct the specification for the second quarter of 1974 to show net interim earnings of $260 and a net backpay of $1,839.50, instead of $2,099.50, as alleged.

[10] Riffle was paid a percentage of the amount which Respondent charged for transporting each load.

[11] Under this proposal, drivers "would get 50 percent of the revenue from the truck and they would agree to take care of service, part of maintenance . . ." and other items.

and he stated to me, somebody else had already signed for my tractor.

Laverne Wills testified that he was secretary-treasurer of K & W Trucking, Inc.; that "our trucks were leased to Circle Transport and Circle had [a] contract with General Electric to haul their glass"; that Frank Manfredi, president of Circle, retained the right "under that lease" to "tell . . . who was going to drive those trucks"; and that Manfredi "forbid" Wills "to put" Riffle "back on" the "shuttle run."[12] Frank Manfredi did not testify. However, Joseph LaFontaine, production control supervisor for General Electric, testified that he never complained to K & W or Circle "to the effect that [he] did not want Riffle to work on the shuttle run"; that he knows of no "official" with General Electric who made any "complaint"; and that he "would know" of such complaints because he is "in charge of warehousing, shipping and receiving" at the plant.

Wills testified that Riffle was assigned a 1965 or 1966 vehicle when he returned to work in February 1975; that Riffle repeatedly complained about the condition of this vehicle; and that "occasionally there was minor things that we found" wrong with the vehicle, "but nothing that would handicap a driver from driving it." According to Wills, the "malfunctions" were corrected. However, as Wills testified, Riffle's "income was affected some because we were having such a time trying to find out what was wrong with his tractor . . . ." Wills acknowledged that the "lease arrangement," which he had proposed to drivers during early 1975, had been "set aside temporarily." Wills claimed: "Mr. Riffle didn't show up for his dispatch one morning and I believe I didn't hear anymore for several days until we got this complaint."

Wills claimed that Riffle "did not show up for work the next morning to cover the dispatch that I had for him"; "it was in his box"; "we did it every evening and I put a dispatch sheet in the box."[13]

I credit the testimony of employee Riffle as summarized herein. I find that Respondent, since about February 3, 1975, did not reinstate Riffle to his former or a substantially equivalent position. Instead, as Riffle credibly testified, the employee was assigned less desirable and less remunerative work. He was given an older vehicle with mechanical problems. He experienced numerous equipment breakdowns and backup or replacement vehicles were not made available for his use. Consequently, he lost time and money. Further, management no longer notified Riffle in advance about run cancellations. And, ultimately, management withheld all run assignments from Riffle, thereby causing his constructive discharge on March 27, 1975.

I do not credit the testimony of Wills. I do not find him to be a trustworthy or reliable witness. In particular, I do not find credible Wills' unsupported assertion to the effect that Riffle was not returned to the General Electric "shuttle run" because of some complaint concerning the employee's work. Indeed, LaFontaine credibly testified that, as production control supervisor for General Electric, he "would know" of such a complaint and he in fact had never heard of such a complaint. Further, I do not credit Wills' assertion that Riffle was assigned a satisfactory vehicle in 1975; that "malfunctions" in the vehicle were corrected; and that Riffle "didn't show up for his dispatch one morning and [Wills] didn't hear anymore for several days until [he] got this complaint." Instead, I find and conclude that Respondent did not reinstate Riffle to his former or a substantially equivalent position; that Respondent continued to discriminate against the employee because of his earlier union activities; and that Respondent constructively discharged the employee on March 27, 1975, because of his union activities.

Therefore, "this did not constitute a good faith reinstatement to [Riffle's] former or substantially equivalent position." *N.L.R.B.* v. *Interurban Gas Company*, 354 F.2d 76 (6th Cir. 1965). And, backpay will not be tolled during this period.

D. *The Computation of Net Backpay During 1975–76*

As discussed *supra*, employee Riffle worked for Respondent from about February 3 until March 27, 1975. His interim earnings with Respondent during this quarter, as set forth in the specification, are $1,074.60. His net backpay for the first quarter of 1975 is $1,024.90.

Following his discharge in March 1975, Riffle registered with the Ohio Bureau of Employment Services.[14] He was given no job referrals and, during this period, purchased a 1974 Ford tractor and trailer. The tractor cost approximately $18,000 and the trailer cost approximately $3,800. The specification alleges that during the second, third, and fourth quarters of 1975 "Riffle was self-employed as an independent over-the-road tractor-trailer owner-operator. His income tax filings indicate that he suffered a net loss while so self-employed."

Riffle testified that, before purchasing this equipment, he secured a contract with a firm named Pittsburgh and New England Trucking whereby he would be paid 75 percent of the "gross" amount charged for each shipment. This firm had interstate authority to haul goods. Riffle believed that 75 percent of the "gross" would meet his expenses, including the mortgage or finance charges on his newly purchased equipment. However, as Riffle acknowledged: "[I] got the load to the East Coast and there was just no freight there to bring back." Riffle also acknowledged that Pittsburgh and New England Trucking "worked mostly flatbed equipment" from the East Coast, and Riffle did not have this type of equipment. Riffle made no interim earnings in this period and ultimately, as discussed below, his tractor and trailer were repossessed.

[12] Wills acknowledged telling employee Riffle that he "had strict orders not to put him back in . . . on that shuttle run . . . but I could possibly just put him on the board with the rest of the drivers."

[13] Louis Hitler, a mechanic who had performed services for Respondent, claimed that he had examined Riffle's vehicle in 1975 for "safety." He testified: "I believe the examination proved negative." On cross-examination, he testified: "I would say I don't specifically, don't recall the specific complaint, but I do remember the incident." Hitler could not "remember" whether "it was major or minor or what the complaint was." I do not credit the vague and unclear testimony of this witness.

[14] His "Reporting Record" shows that he reported at the Bureau on March 31 and April 7 and 14, 1975, and that he was registered as a tractor-trailer driver. See G.C. Exhs. 2(a) and (b).

During the first quarter of 1976, while Riffle had possession of his tractor-trailer, he "signed on with Chem-Hauler" in an attempt to find additional work. Riffle testified:

> I made the [finance] payments. I was trying to get the payments caught up. I was so far behind on the payments and stuff I just couldn't catch up. . . . I let the Ford Motor Company repossess the tractor.

Riffle added:

> I went to work for Progressive Stores, Inc. . . . I tried to get another guy to drive [the tractor] so that I could get another job so I could try to catch up on the payments and stuff so, I could pay off the truck and use it.[15]

The specification alleges that during the first quarter of 1976 Riffle had gross interim earnings of over $5,000. His gross interim earnings as an independent over-the-road tractor-trailer operator during January 1976 were $2,664.20. He also worked as a bricklayer for one Bob Tyfe and had gross interim earnings from this source in the amount of $400. From late January until about March 17, 1976, Riffle, as stated above, hired an individual to drive his tractor, and his gross interim earnings from this source were $1,762.16. From about March 17–31, 1976, Riffle worked for Progressive Stores, Inc., in Columbus, and his gross interim earnings from this source were $403.32. Riffle's gross interim earnings for this first quarter of 1976 total $5,229.68 and his expenses for operating his equipment exceed his gross interim earnings by more than $800.

As alleged in the specification and testified to by Riffle, the employee's gross interim earnings minus expenses during the second and third quarters of 1976 exceed his gross backpay. No claim is made for these quarters.[16]

I reject Respondent's assertion that Riffle incurred a willful loss of earnings during this period. Following his termination in March 1975, he promptly registered with the state agency. No jobs were available for him as a truckdriver. He purchased a tractor and trailer in an attempt to become an independent over-the-road tractor-trailer owner-operator. He had a contract with Pittsburgh and New England Trucking whereby he would be paid a percentage of each shipment. This proved to be inadequate to meet his finance expenses and operating costs. He "signed up with Chem-Hauler." He attempted to "hire-out" to shipping firms. He took employment with Progressive Stores and secured a driver for his tractor in an effort to meet his finance payments. He also worked as a bricklayer during this period. Under all these circumstances, I find and conclude that Riffle made a good-faith effort to mitigate his loss during this period. As stated, success is not the measure of the reasonableness of his effort. And, although Riffle's business judgment may be questioned, on balance, I do not find that he incurred a willful loss during these quarters.

The Amount of Backpay Due

I find and conclude that employee Riffle is due backpay in the amount of $15,539.09. Such backpay shall include interest in the rate of 6 percent per annum, computed in the manner set forth in *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962), until the date of payment. There should be deducted from this amount any tax required to be withheld by Federal or state law.[17]

II. THE UNFAIR LABOR PRACTICE PROCEEDING

The General Counsel argues in Case 9-CA-9562 that Respondent violated Section 8(a)(1), (3), and (4) of the Act by its treatment of employee Riffle following his reinstatement. As found *supra*, Respondent offered employee Riffle reinstatement on or about January 29, 1975. However, Riffle was not reinstated to his former or a substantially equivalent position. Instead, commencing on or about February 3, 1975, Riffle was given less desirable and less remunerative work. He was assigned an older vehicle, which had numerous mechanical problems. He experienced repeated breakdowns in this equipment. Backup and replacement vehicles were not made available to him. He was no longer notified in advance about run cancellations. Consequently, he made less money. And, on or about March 27, 1975, management caused Riffle's discharge by withholding all load assignments from the driver. I find and conclude that Respondent's treatment of employee Riffle was motivated in substantial part by the employee's earlier union activities. I find and conclude that Respondent violated Section 8(a)(1) and (3) of the Act by engaging in a course of conduct culminating in employee Riffle's constructive discharge on or about March 27, 1975.[18]

K & W Trucking, Inc., moves to dismiss the complaint in Case 9-CA-9562, stating:

> K & W Trucking, Inc. is not engaged in interstate commerce. K & W Trucking, Inc. is not doing business as Circle Transport. K & W and Circle are separate and distinct legal entities, one of which engages in interstate commerce and one of which engages solely in intrastate commerce. Mr. Manfredi, the sole owner of Circle Transport, has all hauling rights under PUCO permits and K & W leased equipment to Circle Transport who hauled their freight. In view of the lessor-lessee relationships and the lack of K & W to haul without the authority of another corporation, the finding of jurisdiction was in error.
>
> The facts alleged in the complaint, if proven, do not constitute a new cause of action, but merely a contempt of Case 9-CA-8387, and the proper proce-

[15] Riffle testified that he attempted "to contact other companies" in an effort to "hire out" his tractor. He recalled: "I tried All-State Trucking . . . I tried Weinham . . . Anchor Trucking . . . . I wanted to sign on my truck . . . ." Riffle was "trying" to "save" the tractor.

[16] I credit the testimony of Riffle as summarized herein. As stated, I find him to be a credible and trustworthy witness.

[17] The backpay obligation will continue, as discussed *supra*, until Respondent makes a bona fide offer of reinstatement to employee Riffle.

[18] The General Counsel alleges that Respondent, by the above conduct, also violated Sec. 8(a)(4) of the Act. I find insufficient evidence in this record to support such a finding and would dismiss this portion of the complaint.

dure was to bring a contempt action in the original case, not a new charge.

In the initial unfair labor practice proceeding (Case 9-CA-8387), Respondent admitted the jurisdictional allegations of the complaint. Later, however, Respondent moved the Board to reconsider the case for reasons essentially similar to those now asserted in the above motion. The Board rejected this earlier motion, stating (215 NLRB 127):

> Respondent's motion is hereby denied as it fails to allege evidence that was not available to its attorney at the time of the hearing. In our view, Respondent's motion amounts to a circuitous attempt belatedly to amend its answer to the complaint by claiming the discovery of facts that should have been known to Respondent at the time of the hearing. Contrary to Respondent's claim, the record shows that Respondent, who was represented by competent counsel from the outset of this litigation, had ample opportunity to litigate the issue that it now seeks to raise.
>
> From the time the original unfair labor charge was filed, both K & W and Circle were sufficiently forewarned that the charge was being instituted against them as one and the same business entity. Thus, the charge named Circle Transport as the Employer and listed the names of Charles Keaton and Laverne Wills, the coowners of K & W, as the Employer's representatives. The charge was mailed to Circle Transport and the registered letter receipt was signed by Wills on behalf of Circle Transport. Thereafter, the complaint and notice of hearing named K & W Trucking, Inc., d/b/a Circle Transport, as the Respondent and alleged that Respondent was engaged in interstate commerce. Respondent's answer to the complaint, though captioned, "K & W Trucking, Inc. *and* Circle Transport," admitted in its entirety the complaint's jurisdiction allegation. So, too, at the hearing, Respondent's attorney signed the "attorney appearance form" as counsel for K & W Trucking, Inc., d/b/a Circle Transport.
>
> The foregoing indicates that, even before the hearing, Respondent's attorney knew, or clearly should have known, that K & W was being treated as a company "doing business as," or operating in the name of, Circle Transport. During the hearing, Respondent had ample opportunity to raise the issue concerning the asserted separate identities of the parties. For example, in response to the Administrative Law Judge's inquiries, Keaton testified that K & W owned its trucks and hired its drivers and that the relationship between K & W and Circle Transport was one of lessor-lessee. However, Respondent made no effort to amend its answer to conform with Keaton's testimony.

The Board's Order in Case 9-CA-8387 was enforced in full by the Sixth Circuit in a Consent Judgment.

At the hearing, I denied this motion. Upon reconsideration, I adhere to that ruling. The Board has rejected this contention and made jurisdictional findings in Case 9-CA-8387. The consolidated proceedings before me (Case 9-CA-8387 and 9562) involve the same parties and, in effect, the same transaction. Respondent does not attempt to dismiss the backpay proceeding. Respondent, however, would dismiss the complaint in Case 9-CA-9562 although this proceeding is essentially a supplemental proceeding emanating from the initial case. Indeed, the General Counsel, in Case 9-CA-9562, is principally attempting to effectuate compliance with the Board's initial Order.

I conclude that the Board's jurisdictional findings in Case 9-CA-8387 are controlling here. As the court stated in *Julius Hyman* v. *Joseph Regenstein*, 258 F.2d 502, 510 (5th Cir. 1958):

> It, of course, is well settled law that a fact decided in an earlier suit is conclusively established between their parties and their privies, provided it was necessary to the result in the first suit. *The Evergreens* v. *Nunan*, 2 Cir., 1944, 141 F.2d 927, 928, 152 A.L.R. 1187. *American Jurisprudence*, Judgments, Section 371, states the rule:
>
> > It is a fundamental principle of jurisprudence that material facts or questions which were in issue in a former action, and were there admitted or judically determined, are conclusively settled by a judgment rendered therein, and that such facts or questions become *res judicata* and may not again be litigated in a subsequent action between the same parties or their privies, regardless of the form the issues may take in the subsequent action, whether the subsequent action involves the same or a different form of proceeding, or whether the second action is upon the same or a different cause of action, subject matter, claim, or demand, as the earlier action. In such cases, it is also immaterial that the two actions are based on different grounds, or tried on different theories, or instituted for different purposes, and seek different relief.
>
> Similarly, Freeman writes: "Regardless of any difference in the cause of action or subject matter, the conclusiveness of a former adjudication extends to every question in issue and determined by the court * * * though not then directly the point in issue. * * * [A judgment] is conclusive as to all matters within the scope of the pleadings which are material and relevant and were in fact determined." 2 Freeman On Judgments, Section 688, p. 1450.

Also see *Truck Drivers and Helpers Local No. 728, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America* [*Georgia Highway Express, Inc.*] v. *N.L.R.B.*, 415 F.2d 986, 988 (D.C. Cir. 1969), cert. denied 397 U.S. 935 (1970), where the court noted:

> There is sound scope for principles of estoppel in administrative adjudications. . . . There is no reason why an agency any more than a court

should be required to squander limited and overtaxed resources of decisional and staff personnel by reconsidering matters already fairly heard and determined.

In the case before us the application of the principles of estoppel was well within the Board's discretion . . . .[19]

CONCLUSIONS OF LAW

1. Respondent K & W Trucking, Inc., d/b/a Circle Transport is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Teamsters Local Union No. 413, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent, by its discriminatory treatment of employee Riffle culminating in his constructive discharge on or about March 27, 1975, violated Section 8(a)(1) and (3) of the Act.

4. The General Counsel has failed to prove that Respondent also violated Section 8(a)(4) of the Act, as alleged.

5. The unfair labor practices found herein affect commerce within the meaning of the Act.

REMEDY

To remedy the unfair labor practices found herein, Respondent will be directed to cease and desist from engaging in such conduct; to cease and desist from in any other manner interfering with employee Section 7 rights; and to post the attached notice. Further, Respondent will be directed to offer employee Riffle immediate and full reinstatement to his former or a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and to make him whole for any loss of earnings suffered by reason of his unlawful termination by payment to him of a sum of money equal to that which he normally would have earned from the date of Respondent's discrimination to the date of Respondent's offer of reinstatement, less net earnings during such period, with backpay computed on a quarterly basis in the manner established by the Board in *F. W. Woolworth Company*, 90 NLRB 289 (1950). Backpay shall carry interest at the rate of 6 percent per annum, as set forth in *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962). Further, Respondent will preserve and make available to the Board, upon request, all payroll records and reports and all other records necessary and useful to determine the amount of backpay due and the rights of reinstatement under the terms of these recommendations.

Upon the foregoing findings of fact, conclusions of law, and the entire record in this consolidated proceeding, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[20]

The Respondent, K & W Trucking, Inc., d/b/a Circle Transport, Circleville, Ohio, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in Local Union No. 413, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization, by discriminatorily discharging any of its employees or by, in any other manner, discriminating against them with respect to their hire or tenure of employment or any other term or condition of their employment.

(b) In any other manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Pay to employee Larry R. Riffle, as net backpay, the amount set forth in this Supplemental Decision, as provided above.

(b) Offer employee Riffle immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of earnings in the manner set forth in this Supplemental Decision.

(c) Preserve and make available to the Board or its agents all payroll and other records, as set forth in this Supplemental Decision.

(d) Post at its facilities in Circleville, Ohio, copies of the notice attached hereto as an "Appendix."[21] Copies of said notice, on forms provided by the Regional Director for Region 9, shall, after being duly signed by Respondent, be posted immediately upon receipt thereof, in conspicuous places, including all places where notices are customarily posted and be maintained by it for a period of 60 consecutive days. Reasonable steps shall be taken

[19] Respondent alleged that the instant unfair labor practice case should properly be brought as a "contempt action in the original case." While such a vehicle may also be an appropriate procedure for bringing Respondent into compliance with the Act, Sec. 10(a) of the Act states:

> The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power should not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise . . . .

Further, Respondent alleged that this "alleged unfair labor practice occurred more than 6 months prior to the filing of the charge. An offer of reinstatement occurred January 29, 1975, and the [charge] was filed August 14, 1975." However, the gravamen of this supplemental complaint is Respondent's course of conduct culminating in Riffle's constructive discharge on or about March 27, 1975. Riffle's constructive discharge is within the time limitation period of Sec. 10(b) of the Act. Moreover, Respondent's discriminatory treatment of Riffle, following his reinstatement, is well within the ambit of the initial charge filed in the initial consolidated proceeding. See *N.L.R.B.* v. *Fant Milling Company*, 360 U.S. 301, 308-309 (1959).

[20] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[21] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 9, in writing, within 20 days from the date of this Supplemental Decision, what steps Respondent has taken to comply herewith.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing in which both sides had the opportunity to present their evidence, the National Labor Relations Board has found that K & W Trucking, Inc., d/b/a Circle Transport, has violated the National Labor Relations Act and has ordered us to post this notice. We therefore notify you that:

WE WILL NOT discourage membership in Local Union No. 413, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization, by discriminatorily discharging any of our employees, or by in any other manner discriminating against them with respect to their hire or tenure of employment or any term or condition of employment.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL offer employee Larry R. Riffle immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for his loss of earnings, as provided in the Board's Supplemental Decision and Order.

K & W TRUCKING, INC., D/B/A CIRCLE TRANSPORT